No. 75-1151

In the Supreme Court of the United States

OCTOBER TERM, 1975

ROBERT NICHOLSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 525 F.2d 1233.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1976. The petition for a writ of certiorari was filed on February 13, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Certain evidence adduced before the grand jury was suppressed at trial. The question presented is whether this required the district court to quash the indictment.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted of conspiring to transport stolen property worth more than $5,000 in interstate commerce, knowing the property to have been stolen, in violation of 18 U.S.C. 371 and 2314. He was sentenced to two years' imprisonment, subject to the immediate parole eligibility provision of 18 U.S.C. 4208(a)(2). The court of appeals affirmed.

The evidence is fairly summarized in the opinion of the court of appeals. It shows that petitioner, his brother William Nicholson, and James Lawhon[1] conspired to transport stolen telephones valued at more than $5,000 in interstate commerce, knowing that the telephones had been stolen. On more than 100 occasions Lawhon, a former Bell Telephone Company employee, stole new and reconditioned telephones from the Southern Bell (now South Central Bell) properties in the New Orleans area (I Tr. 32-37).[2] Each week he shipped approximately 200 stolen telephones, many of which were new equipment, to Nichco, Inc., in Ohio (I Tr. 45-47). Nicho is owned by petitioner.

Lawhon used fictitious names and addresses on all invoices and packages shipped to Nichco (I Tr. 50-59). Pursuant to telephone arrangements made between Nichco and Lawhon, payment to Lawhon was made by check payable to Lawhon. Each check was signed by petitioner and sent to Lawhon's correct address in New Orleans. Upon receipt of the telephones, Nichco employees destroyed the

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[1]Lawhon was indicted with petitioner, pleaded guilty, and testified for the government as its principal witness.

[2]Each day's proceedings were transcribed in a separate volume with its own pagination. "I Tr." refers to the proceedings of Monday, August 12, 1974.

"Bell System" boxes in which the phones had been packed and, at the direction of petitioner and his brother, removed the identification marking, "Bell System Property; Not for Sale," from the telephones (I Tr. 49, 60, 70-71).

During the 28-month duration of this conspiracy Nichco, Inc., paid Lawhon more than $40,000 for the telephones (I Tr. 92). That price was approximately one quarter of the manufacturer's price to Southern Bell (I Tr. 74). Nichco sold those phones, principally to Olson Electronics of Akron, Ohio, for approximately twice the amount it paid for them.

ARGUMENT

Petitioner contends (Pet. 4-5) that only he and his brother testified before the grand jury, and that since the trial court suppressed that testimony at trial,[3] there was no competent evidence upon which the grand jury could have relied to support its indictment. Petitioner argues that the indictment consequently should have been dismissed. No decision of a court of appeals supports this argument, and there is no reason to grant the writ.

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[3]The district court's precise reason for granting the motion to suppress at trial is unclear. The court of appeals observed (Pet. App. 13, n. 1) that the motion was apparently granted because the Assistant United States Attorney informed the Nicholsons that they were not the subject of the grand jury inquiry and would not need an attorney. As a result, they appeared before the grand jury without consulting an attorney. Petitioner, however, was advised of his rights at the commencement of his testimony before the grand jury, and he was informed that "[o]ne or more of the matters being investigated may involve [him] directly or indirectly" (Transcript of Grand Jury Proceedings, May 10, 1973, at 2-3). However that may be, we are not here contesting the propriety of the suppression at trial of the grand jury testimony, and there is no need to hold this case pending this Court's decision in *United States* v. *Mandujano*, No. 74-754, argued November 5, 1975.

As the court of appeals observed (Pet. App. 13), "[t]here is no indication in the record that the indictment was based solely on the testimony of the Nicholsons. * * * No attempt was made by [petitioner] to preserve this point for appeal by proof that the only witnesses who testified at the grand jury proceeding were the Nicholsons." The government informed the court of appeals that other evidence had been presented to the grand jury but not transcribed. It offered to supplement the record, a step that the court of appeals did not require.

Assuming *arguendo* that the only evidence before the grand jury was the testimony suppressed at trial, the indictment nevertheless was valid. "[A]n indictment returned by a legally constituted nonbiased grand jury, * * * if valid on its face, is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment." *Lawn* v. *United States*, 355 U.S. 339, 349. See also *Costello* v. *United States*, 350 U.S. 359, 363. Indeed, the grand jury may properly consider evidence clearly inadmissible at a subsequent trial, including tips, rumors and the grand jurors' personal knowledge. *United States* v. *Dionisio*, 410 U.S. 1, 15; *Branzburg* v. *Hayes*, 408 U.S. 665, 701.

This is not a case in which literally *no* evidence was before the grand jury. Petitioner alleges only that no "competent" evidence was considered by that body. If the testimony of petitioner and his brother was in fact presented to the grand jury in violation of petitioner's constitutional rights, petitioner was entitled to no more than suppression of that evidence at trial. *United States* v. *Calandra*, 414 U.S. 338. Petitioner received the benefit at trial of a strict (perhaps excessive) observance of the rules designed to bring about a fair verdict. He cannot now challenge the indictment on the ground that it was not supported by adequate or competent evidence.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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